

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2008 Session

HAMADI GYASI HALEY v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Knox County
No. 78351 Mary Beth Leibowitz, Judge**

No. E2007-02075-CCA-R3-PC - Filed May 6, 2009

The petitioner, Hamadi Gyasi Haley, appeals from the Knox County Criminal Court's denial of post-conviction relief from his convictions for first degree felony murder, especially aggravated robbery, and aggravated robbery for which he is serving concurrent sentences of life, seventeen years, and eight years, respectively. The petitioner contends that he received the ineffective assistance of counsel and that his constitutional rights were violated because he is actually innocent and because the State lost potentially exculpatory evidence. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Lance B. Mayes, Nashville, Tennessee, for the appellant, Hamadi Gyasi Haley.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kevin James Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts of the petitioner's crimes were summarized by this court on direct appeal:

Shortly before 6:00 A.M. on September 26, 1999, the victim, Keith Jackson, was shot and killed as he left Mr. C's Private Party Lounge located at the corner of McCalla Avenue and Spurgeon Street in Knoxville. After being dispatched to the scene, Knoxville Police Officer Gerald Smith, an evidence technician and former supervisor of the TBI Crime Laboratory, found the body of the victim, who had a shotgun wound to the left side of his head. A gray Ford Granada

automobile, having a temporary tag, was parked near the body of the victim.

Rauf Muhammad, the owner of Kings and Queens Fashions, testified that at approximately 3:00 A.M. on the morning of the murder, he arrived at J.T.'s Lounge, only a short distance from Mr. C's Private Party Lounge. While there, he observed the defendant and Carlos Emmanuel Mahone "hanging around" with several other men outside the club. Although Muhammad had not seen the two men before, he was able to identify them at their joint trial. While Muhammad was present when the victim was shot, he could not say who fired the shot. He recalled that after the shooting, several of the men ran toward a housing project, which was nearby, and another got into a car and sped away. Muhammad remembered that a man named Derrick Perry, whom he knew as D.P., and a second individual ran to the front of the Lounge after the shooting. Muhammad heard the second individual say, "Somebody please call the police," explaining that he had been robbed and his friend had been shot. Later, Muhammad learned that the individual was Alando Murphy, a Jamaican. Muhammad observed Murphy confront Perry, saying, "You know what happened; you were there; you all killed...."

Michael Taylor testified that he saw the defendant, with whom he was acquainted, and Mahone "hanging out" at J.T.'s Pool Hall on the morning of the murder. He testified that Perry, John Foxx, and Chase Jackson, were also at the scene. Taylor, who acknowledged that he had a pistol in his possession at the time of the shooting, stated that he did not fire his pistol, that he did not see the robbery, and that he did not see who killed the victim. Taylor acknowledged that he was arrested as he fled from the scene. He recalled informing police that the defendant and Mahone, the "two people from Alcoa," were at the crime scene on the morning of the murder.

Alando Murphy testified that he owned the Ford Granada found at the scene. He recalled that he and the victim were celebrating his birthday and were about to get into his car to leave when they were confronted by "six guys," all of whom were armed and who directed them to lie down. Murphy testified that he squatted on the driver's side of the vehicle as four or five of the assailants surrounded the victim. Murphy remembered that the defendant possessed a shotgun and recalled that the defendant instructed Mahone "to hold a gun to [Murphy's] head," and to "pull the trigger" if Murphy moved. He stated that the defendant searched his car and that the defendant and Chase Jackson searched his pockets. Jackson,

Murphy recalled, “snatched my earring off my ear.” The men took his earring, his pager, his car keys, and \$50 to \$60 from his pocket. Murphy testified that he begged the men to spare the victim’s life and was beaten by Jackson, Mahone, and Foxx. He recalled that the men went through the victim’s pockets and took his chain, his jewelry, and a ring. When the victim asked to keep his wedding ring, the defendant said, “You ain’t married no more,” and took it. At that point, one of the men said, “Take his shoes off.” When the victim answered, “You got everything else, man, I ain’t gonna take my shoes off,” Murphy heard a gun “blast, boom” and saw the victim fall to the ground. The defendant and Mahone then ran from the scene. Murphy made a positive identification of both the defendant and Mahone, explaining, “I’ll never forget these guys[’] faces.” Murphy recalled that Derrick Perry was at the scene, “just watching.” On cross-examination, Murphy admitted that he had previously participated in the attempted aggravated robbery of a couple in Springfield, Tennessee, and acknowledged that he had served a term in prison for theft of more than \$60,000.00 as a result. Murphy also admitted that he had violated terms of his parole by smoking marijuana.

An autopsy established that the victim died of a gunshot wound to the left side of the head near the ear. There was an abrasion to the upper left chest of the victim, above the collarbone. The victim had a blood alcohol level of .21 and tested positive for sertraline, a generic name of Zoloft, an anti-depressant.

State v. Hamadi G. Haley, No. E2001-01244-CCA-R3-CD, Knox County (Tenn. Crim. App. Apr. 22, 2002), app. denied (Tenn. Oct. 21, 2002).

At the post-conviction hearing, trial counsel testified that she was licensed to practice law in 1991 and had been trying murder cases since the mid-1990s. The trial court noted on the record that the petitioner’s trial was in January 2001. Counsel said that it had been several years since she reviewed the petitioner’s file and that her memory was vague on some matters. She thought she had requested funds for a private investigator, and although she did not recall whether an investigator produced a report, she said she would have given the petitioner a copy of such a report if it existed.

Trial counsel recalled that the victim had been shot in the head and that there were about five defendants. She said there was another “faction of gentlemen” who were arrested and gave statements. She said there was a motion for severance and that the petitioner and Mr. Mahone were not severed because Mr. Mahone did not give a statement that inculpated the petitioner as the shooter.

Trial counsel testified that although she had an investigator, she did much of the investigative work herself. She said she focused on Mr. Murphy because the case rose or fell on his credibility. She said she went to Robertson County twice in order to obtain records about a crime in which Mr.

Murphy had been involved in a home invasion in which a victim was shot and paralyzed. She said she also investigated Mr. Murphy's involvement in the Andre Stinson death in Knoxville. She said she interviewed Mr. Murphy. She said she also interviewed Mr. Turner, the medical examiner, all the officers, and all the witnesses on the indictment. She said she spoke with everyone she was able to identify as having been at the scene. She recalled that there were some witnesses she was unable to locate, but she did not recall having raised any motions with the trial court relative to her inability to locate the witnesses. She said she did not believe she had a basis to request a missing witness instruction.

Trial counsel testified that she was limited in the defense evidence she could present, including alibi evidence, due to the petitioner's statements to her. She said that with the exception of Mr. Mahone, the other co-defendants implicated themselves in felony murder and identified the petitioner as the shooter. She said, however, that Mr. Murphy was the only witness who could place the weapon in the petitioner's hand. She said she was successful in obtaining a ruling that prevented the prosecution from calling Mr. Fox as a witness. She said that she did not recall asking for an enhanced credibility instruction relative to Mr. Murphy but that the court allowed her leeway in examining him about his past crimes. She said that although she did not specifically recall listening to the 9-1-1 tape, she always did so. She recalled viewing the crime scene video and said that although there was no means to show the video to the petitioner at the jail, she discussed its contents with him.

Trial counsel testified that before trial, she spoke with Mr. Turner, whom she knew from discovery had said that Mr. Perry was the shooter. She said he was very reluctant to speak with her and claimed he did not remember anything. She said he also claimed he was being threatened and said he was not going to talk. She said that she decided not to subpoena him for trial because he claimed he had no memory and would not become involved and that she discussed this decision with the petitioner. She said that after the trial, Mr. Turner contacted her and she obtained an affidavit in which he identified the shooter as Mr. Perry. She said that based upon this information, she filed a motion for new trial for newly discovered evidence. She said that in order to have Mr. Turner come to court to testify, she had to have him arrested. She said he recanted his story and the motion was denied.

Trial counsel testified that "perhaps" she should have objected to the statement in the autopsy report, which was an exhibit, that the victim had been killed with a shotgun during a robbery. She said that it was typical of Doctor Elkins to include a narrative of information from the police officers but that she did not consider it to be a forensic opinion that someone died in a robbery. She said there was eyewitness testimony about the robbery and that she did not think there was a factual dispute whether a robbery had occurred. She acknowledged that the autopsy report reflected that the victim's wallet was still in his pocket. She said, however, that there was evidence about someone being forced to remove shoes and about an argument over a wedding ring. She said she was aware the autopsy report stated that the victim was wearing shoes but did not recall whether she raised this at trial. She acknowledged that there was no physical evidence linking the defendant to the crime and said that she cross-examined Officer Gerald Smith relative to this lack of physical proof.

Trial counsel testified that she investigated Sandra Beason, whose fingerprints were found in a car. She said she learned that Ms. Beason had a murder charge in Shelby County but that she was not able to locate Ms. Beason or determine that Ms. Beason had ever been to Knoxville. She said she could not determine the circumstances in which Ms. Beason had been in the car.

Trial counsel testified that she explained the petitioner's right to testify to him. She said, however, "[O]nce a defendant tells me that they're involved in a robbery and they're the one that shot the individual in the head, I can't put him up there and tell him he has to—and try to perpetrate a fraud on the Court. . . ."

Trial counsel testified that she filed a motion in limine to prohibit references to gangs, which she said was granted. When questioned about a specific incident from the transcript in which the prosecutor made references to a "'gang' offense" and a "'gang' of people" without defense objection, trial counsel stated that she thought this meant a gang of people, not a street gang. She said there was no reference to the "[Crips] or Bloods."

Trial counsel testified that she met with the petitioner numerous times and received letters from him. She could not estimate a specific number of meetings.

Trial counsel testified that she never raised an issue of merger relative to the petitioner having convictions for both especially aggravated robbery and aggravated robbery. She explained that there were two victims.

After refreshing her recollection by reviewing the transcript, trial counsel testified that she made a motion for mistrial after the prosecutor made a comment about the defendant not testifying. She acknowledged that she did not raise the issue on appeal. She said she thought the strongest issue for appeal involved the newly discovered evidence relative to Mr. Turner and threats he claimed he had received from a detective. She said she met with the petitioner after the trial and discussed all of the appellate issues that she thought should be raised.

Liza Jackson testified that he was at the scene of the crime. He said that Derrick Perry was talking about robbing Orlando Murphy and Keith Jackson for money and "weed." He said Perry, John Fox, and "T" Brown were the ones who perpetrated the crimes, with Perry being the shooter. He said that the next day, the perpetrators wanted to blame the crime on some individuals from Alcoa. He said that he would have testified to these facts had he been called at trial. He acknowledged a statement he gave in 1999 in which he implicated someone from Alcoa as the shooter. He said he did not identify the defendant by name and that he only gave the statement in order to avoid going to jail. He said no one had ever interviewed him after this initial statement.

Mr. Jackson testified that he had not been charged with the crimes in this case. He said that when he was interviewed, he was told that he would be taken to jail unless he gave a statement. He said he was also threatened with thirty years and a life sentence.

Natasha Sanke testified that she was presently the petitioner's girlfriend and that she was dating him at the time of the crimes. She said that she may have met trial counsel but did not recall

having ever talked one-on-one with her. She recalled that on the day of the crimes, she and the petitioner had a fight. She said she did not see him until around 5:00 the following morning. She said that she did not believe the petitioner was guilty of the crimes and was willing to testify that he was with her when the crimes occurred. She said she discussed this with the petitioner and that to her knowledge, the petitioner informed trial counsel of her willingness to testify.

The petitioner testified that trial counsel told him she had talked to Dion Turner and that because Turner did not want to testify, she was not going to call him as a witness. He confirmed that trial counsel told him of the importance of Orlando Murphy's testimony. He said that he told trial counsel that his girlfriend was willing to be an alibi witness. He said that counsel told him she was not going to call his girlfriend as a witness due to "the way it would look" in view of the fact that he was not going to testify and had not given a statement that would be offered as evidence. He said that had he known trial counsel could compel these witnesses to testify, he would have wanted them to testify in his case.

The petitioner testified that trial counsel conveyed a plea offer to him before trial for forty years at eighty-five percent. He said he rejected the offer because he did not commit the crimes. He said that he understood that by rejecting the plea offer he risked being convicted of murder but that trial counsel did not explain anything further to him. He said counsel never discussed severance issues or trial strategy with him. He said that he was not knowledgeable about the law at the time and that he placed his trust in trial counsel.

The petitioner testified that although he met with trial counsel after his conviction, she never discussed his appeal with him. He said the only information he gave her was that she was withdrawing after the appeal was decided. He said counsel did discuss with him the motion for new trial based upon Dion Turner's statement.

The petitioner testified that he was never given access to a 9-1-1 tape or a videotape of the crime scene. He said he never received recorded statements of his co-defendants, but he then testified that he was provided with their statements. He said he received a transcribed statement of Alicia Cobb. He said he received no statement of George Zenn Bradley. He acknowledged having received statements of the victims, Ralph Mohammed and Keith Jackson.

The petitioner testified that his defense was that he did not commit the crimes and did not know who did. He said trial counsel was lying when she testified that he confessed to her that he had participated in the robbery and killed the victim.

In rebuttal trial counsel testified that she met with the petitioner regularly and informed him of the status of his case. She said she never felt like she and the petitioner had any conflict during the case. She said she advised the petitioner, who was scheduled for trial first, that there was a grave danger of his co-defendants pleading guilty and testifying against him.

Trial counsel testified that since her testimony during the defendant's case-in-chief, she had reviewed her file. She said that based upon the information in the file, she met with the medical examiner, Dr. Elkins. She said that her file also contained a memo memorializing that she had

spoken with Alicia Cobb and that Ms. Cobb stated that she heard a gunshot when she was parked down the street from the crime scene but had not seen anything. Counsel said Ms. Cobb reported that she was with George Zenn Bradley at the time. Counsel said she eliminated Ms. Cobb as a witness because Ms. Cobb did not see anything.

Trial counsel explained her strategy in eliminating other potential witnesses. She said that after her investigation, she was unable to connect Ms. Beason to the case. She said Ms. Sanke's alibi testimony would be perjurious. She said that after speaking with Mr. Turner, she eliminated him because he was a friend of Mr. Murphy's and would likely claim he had forgotten what happened. She said she did not think it would have been an effective strategy to examine Mr. Turner about his prior statement that did not implicate the petitioner as the shooter. She said Chase Jackson was a co-defendant and had given a statement which inculpated the defendant. She said she discussed with the defendant her decisions relative to witnesses and subpoena power. She also discussed his right to testify with him but counseled him that she thought it was not in his best interest to testify.

Trial counsel testified that although she did not meet with the petitioner at his prison before she filed the appellate brief, she met with him at the post-trial hearings. She said she provided him with a copy of the brief.

After receiving the evidence, the trial court denied relief in a written order. The court noted that the petitioner failed to establish that he had received the ineffective assistance of counsel because he failed to prove that counsel's performance had been deficient or that he had been prejudiced by the alleged shortcomings. This appeal followed.

I

The petitioner argues that the trial court erred in denying him post-conviction relief because he established ineffective assistance of counsel. The burden in a post-conviction proceeding is on the petitioner to prove his factual grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough. The petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The petitioner argues that because his allegations involve an actual innocence claim, this court should apply a lower standard of review than that recited above. We note that the cases cited

by the petitioner do not support this argument. In any event, the issues raised at the post-conviction hearing all fell under the umbrella of ineffective assistance of counsel, and the petitioner did not raise a free-standing constitutional due process claim based upon actual innocence in the trial court. Our standard of review is properly defined above.

A. Failure to Investigate

The petitioner argues that counsel failed to conduct a thorough investigation. However, the record reflects that counsel and her investigator interviewed numerous witnesses. Counsel spoke with Dion Turner and determined that he would not be an advantageous witness for the defense. Counsel considered Ms. Sanke as a prospective witness. Counsel eliminated Ms. Sanke as a witness because she knew based upon the petitioner's statements to her that he shot the victim and that Ms. Sanke's purpose in testifying would be to provide him with a false alibi. Counsel attempted to locate Sandra Beason and was able to find information about her, but she was unable to find any factual connection between Ms. Beason and the crime. The record belies the petitioner's assertion that trial counsel failed to conduct an adequate investigation. The trial court did not err in denying post-conviction relief on this basis.

B. Failure to Confer with Petitioner

The petitioner contends that trial counsel failed to keep him informed and to discuss trial and appellate preparation with him. Trial counsel testified that she advised and informed the petitioner throughout the proceedings. In denying relief, the trial court obviously accredited the testimony of trial counsel over that of the petitioner. The trial court did not err in denying relief on this basis.

C. Trial Strategy and Representation

The petitioner complains that trial counsel failed to call Dion Turner and Natasha Sanke as witnesses. Trial counsel testified that Mr. Turner, who had identified the petitioner as the shooter in a pretrial statement and later told her he could not remember what happened, told her after the trial that Mr. Perry was the shooter. Ms. Sanke testified that she would have provided the petitioner with an alibi, notwithstanding the fact that she did not know the petitioner's whereabouts at the time of the offense. Trial counsel testified about her reasons for not calling either of these individuals as witnesses. She said that she did not think that Mr. Turner would be helpful and that she thought he would claim not to remember what happened. She said that she did not call Ms. Sanke because she knew the testimony would be false after the petitioner admitted to her that he was at the scene and shot the victim. Contrary to the petitioner's allegations, counsel made an informed, strategic decision not to call these witnesses. The trial court did not err in denying relief on this basis.

The petitioner also claims trial counsel was ineffective in failing to object to several statements the prosecutor made during closing arguments related to gangs, the prosecutor's experience, and the credibility of State's witness Alando Murphy. Counsel testified that she interpreted the argument about a "gang" to refer to a gang of people who preyed on innocent people, rather than to a street gang. Counsel did not recall the prosecutor's statements about her experience. The trial record reflects that this argument was made during the prosecutor's rebuttal argument in

the context of answering the defense's argument about evidence that was not presented. The record reflects that trial counsel addressed the prosecutor's argument about Mr. Murphy's credibility in her closing argument. Upon consideration, we hold that trial court did not err in denying post-conviction relief on this basis. The record reflects that counsel made reasonable, strategic decisions regarding the "gang" and credibility arguments. We have considered the portion of the prosecutor's argument in which she mentioned her experience within the context of the entire arguments of both parties, and although we believe the argument would have been more appropriate had it focused on the issues in the case in order to make the prosecutor's point, it does not follow that the petitioner was prejudiced by it. We conclude that the trial court properly denied post-conviction relief on the basis of ineffective assistance of counsel relative to objections not made during closing argument.

The petitioner also claims that counsel provided ineffective assistance by failing to request a special jury instruction relative to State's witness Alanzo Murphy's prior conviction. The petitioner argues that trial counsel should have requested an instruction "such as 42.04 of the Tennessee Pattern Jury Instruction[s]." The record reflects that the court's charge, in fact, included Tennessee Pattern Instruction 42.04. Trial counsel testified that the court gave her wide leeway to cross-examine Mr. Murphy about his criminal history, which the trial record bears out. Given this cross-examination and the instruction given, we hold that the trial court did not err in denying post-conviction relief on this basis.

The petitioner also claims that counsel was ineffective for failing to request a missing witness instruction. In his statement of facts in his brief, he contends that such an instruction was proper for Dion Turner, but in his argument section he fails to identify Mr. Turner in connection with this argument or explain how this instruction was appropriate. In this regard, it is noteworthy that Mr. Turner's pretrial statement to the authorities was inculpatory of the defendant and his pretrial statement to trial counsel was that he did not remember what happened. An absent material witness instruction is not required if a witness is equally available to both parties. Couch v. State, 467 S.W.2d 835, 837 (Tenn. Crim. App. 1971). There is no showing in this case that Mr. Turner was unavailable to the defense. Rather, the evidence is that he was merely a reluctant witness and that trial counsel made the strategic decision not to call him. A missing witness instruction would not have been appropriate, and counsel was not deficient for failing to request it. The trial court did not err in denying post-conviction relief on this basis.

The petitioner also makes several general allegations of ineffective assistance of counsel relative to the conduct of the trial which are unsupported by factual development and argument. This court declines to speculate as to them. The petitioner has failed to establish that he is entitled to post-conviction relief.

D. Failure to Preserve Evidence

The petitioner argues that he may have been prejudiced by the State's loss of a box of evidence that was collected in the State's investigation but not presented at trial. He contends that "[his] ineffective counsel did not view these items as being pertinent to the case, so they were not entered as exhibits." The petitioner has made no showing of how these items were relevant and material to his case and would have changed the outcome of the proceedings to his advantage. Thus,

to the extent that he claims counsel was ineffective in failing to preserve this evidence by having it introduced at trial, he has failed to establish his claim. The trial court did not err in denying relief on this basis.

E. Appeal

The petitioner argues that trial counsel was ineffective on direct appeal to this court by failing to raise issues related to newly discovered evidence, prosecutorial misconduct in closing argument, and in failing to raise various constitutional issues which he does not specifically identify. The record reflects that counsel met with the petitioner several times after the trial and discussed post-trial motions and the appeal. She considered the potential issues and raised those which she thought were strongest.

The petitioner's claims are without merit. This court's opinion on direct appeal refutes the petitioner's claim that counsel failed to raise an issue relative to newly discovered evidence. The opinion reflects that counsel raised issues regarding obstruction of justice in police intimidation of Dion Turner as a potential defense witness and newly discovered evidence in the form of Mr. Turner's post-trial claim that the petitioner was not present when the victim was shot. As discussed above, the petitioner has not shown that counsel's failure to object to closing argument was prejudicial deficient performance, and without such a showing, a finding of ineffective assistance of counsel on appeal of this issue must fail, as well. Finally, without a more specific identification of the alleged constitutional violations and an explanation of how they would entitle the petitioner to appellate relief, this court cannot grant relief.

Trial counsel's appellate strategy was informed and reasonable. The evidence does not preponderate against the trial court's determination that the petitioner failed to establish ineffective assistance of counsel in this regard.

II

Finally, the petitioner has attempted to raise free-standing constitutional due process claims related to actual innocence and the State's loss of potentially exculpatory evidence. At the post-conviction hearing, the issues were all presented in the context of an ineffective assistance of counsel claim. In any event, to the extent that the petitioner has attempted to re-cast these issues as free-standing constitutional claims, the evidence presented and the trial court's findings do not justify relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE